No. 96-623

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

KIMBERLY S. SAAVEDRA, as Special Administratrix of The Estates of Masakazu Yamaguchi, et al.,

Petitioners,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent.

KIMBERLY S. SAAVEDRA, as Special Administratrix of The Estates of Makoto Okai and Yooko Okai, et al.,

Petitioners,

—v.—

KOREAN AIR LINES CO., LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below properly applied, in pending but undecided appeals, the intervening decision of the Court in *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996), to disallow an award of nonpecuniary pre-death pain and suffering damages?

2. Whether, in light of *Zicherman*, the pecuniary damage standard of the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.*, may be supplemented with *any* nonpecuniary damages, on the basis of the Warsaw Convention, general maritime law or state law?

These questions, in an inverse context, are presented for review in the Petition for a Writ of Certiorari filed by Respondent in *Korean Air Lines v. Forman*, No. 96-530 (U.S., docketed Oct. 3, 1996).

RULE 29.6 LISTING

Respondent KOREAN AIR LINES CO., LTD. ("KAL") is a Korean corporation engaged in the business of international transportation by air of passengers, baggage and cargo. KAL is a member of The Hanjin Group of Korea, which comprises companies under common management direction. KAL's investments in securities and/or affiliated companies consist of the following:

Air Cargo Terminal Co., Ltd.
Air Korea Co., Ltd.
Daehan Oil Pipeline Corporation
Government Bonds
Hana Bank
Hanil Bank
Hanjin Construction Co., Ltd.
Hanjin Data Communication
Hanjin Heavy Industry Co., Ltd.
Hanjin International Corp.
Hanjin Int'l Japan Co., Ltd.
Hanjin Investment Securities Co., Ltd.
Hanjin Shipping Co., Ltd.
Hyundai Oil Refinery Co., Ltd.
Korea Air Terminal Service Co., Ltd.
Korea Freight Transportation Co., Ltd.
Korea Investment Corporation
Korean French Banking Corporation
Korea Technology Development Co., Ltd.
Kyungki Bank, Ltd.
Peace Bank of Korea
Terminal One Management Inc.
The Company Fund
The Korea Economic Daily

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Petition for Writ of Certiorari ("Petition") does not make reference to the following relevant Orders of the district court below: *Saavedra v. Korean Air Lines*, Nos. 84-9324 *et al.*, Order Declaring Applicable Law (C.D. Cal. Oct. 19,

1992) and *Saavedra v. Korean Air Lines*, Nos. 84-9324 *et al.*, Order Amending Order of October 19, 1992 Denominated "Order Declaring Applicable Law" (C.D. Cal. July 16, 1993). These Orders are not officially reported but are reproduced in the Appendix hereto at RA 1 and 5, respectively. References preceded by "RA" refer to pages in the Appendix hereto. References preceded by "A" refer to pages in the Appendix to the Petition.

STATUTORY AND TREATY PROVISIONS INVOLVED

These actions are governed exclusively by the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.* and the Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934) (reprinted in note following 49 U.S.C. § 40105) ("Warsaw Convention"). The pertinent provisions are set forth at RA 12-13.

STATEMENT OF THE CASE

Respondent KOREAN AIR LINES CO., LTD. ("KAL") supplements the statement of the case in the Petition to set forth fully the disposition of the cases in the district court and in the Court of Appeals below.

A. The Rulings of the District Court

Prior to trial, KAL moved for a determination that DOHSA applies to the damage claims and prohibits the recovery of any nonpecuniary damages for loss of society, survivor's grief and pre-death pain and suffering of the deceased passengers. The district court[1] ruled that DOHSA did apply and properly

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[1] These cases originally were assigned to District Judge Irving Hill of the Central District of California, who issued pretrial rulings applicable to both cases and who presided over the jury trial of the *Yamaguchi* action. District Judge A. Wallace Tashima presided over the jury trial in the *Okai* actions.

concluded that nonpecuniary damages for loss of society were not recoverable. *Saavedra v. Korean Air Lines*, Nos. 84-9324 *et al.*, Order Declaring Applicable Law (C.D. Cal. Oct. 19, 1992) ("Order Declaring Applicable Law") (RA 1). The district court, however, adopting the argument of Petitioners, held that: (1) nonpecuniary survivor's grief damages were recoverable based on Korean law through § 764 of DOHSA, and (2) nonpecuniary pre-death pain and suffering damages were recoverable "based on Article 17 of the Warsaw Convention". Order Declaring Applicable Law at RA 2-3.

Nine months later, Petitioners moved the district court to delete any reference to Korean law as a basis for any damage recovery. *See Saavedra v. Korean Air Lines*, Nos. 84-9324 *et al.*, Order Amending Order of October 19, 1992 Denominated "Order Declaring Applicable Law" (C.D. Cal. July 16, 1993) ("Amending Order") (RA 5). Petitioners, in a reversal of position, argued that Korean law was inapplicable after all and that survivor's grief damages were recoverable solely on the basis of the Warsaw Convention. Amending Order at RA 6-7. The district court granted Petitioners' motion. Amending Order at RA 7.

Following separate damage trials, the jury in each case awarded pecuniary damages and nonpecuniary damages for survivor's grief and decedents' pre-death pain and suffering, in the amounts set forth in the Petition at 3. The district court in each case denied KAL's post-trial motions to set aside all nonpecuniary damage awards.

B. The Appeals and the Intervening Supreme Court Decision in *Zicherman v. Korean Air Lines*

KAL appealed the judgments entered in the district court, including the pre-trial and post-trial orders of the district court. In its initial appellate briefs, KAL argued that nonpecuniary damages for loss of society and survivor's grief

were not recoverable under DOHSA and that the awards for nonpecuniary pre-death pain and suffering damages were not supported by sufficient evidence. KAL did not argue in its initial briefs the antecedent question of whether nonpecuniary pre-death pain and suffering damages were recoverable as a matter of law because, unlike loss of society damages, *all* pre-*Zicherman* decisions uniformly had allowed the recovery of nonpecuniary pre-death pain and suffering damages on the basis of the Warsaw Convention[2], general maritime law and/or state law.[3] Such was the state of the law, absent a definitive ruling from the Court.

Petitioners argued on appeal that the recoverable damages are defined by the Warsaw Convention, federal common law and/or general maritime law, which Petitioners asserted allow for the recovery of all nonpecuniary damages awarded in the district court.

On January 16, 1996, while the appeals were pending in the court below and after briefing but before argument, the Court decided *Zicherman v. Korean Air Lines*, 116 S. Ct. 629 (1996). The Court in *Zicherman* rejected the notion that any type of damages are recoverable directly under Article 17 of the Warsaw Convention as "damage sustained." *Zicherman*, 116 S. Ct. at 632-636. The Court explained that "damage sustained" in Article 17 refers to "legally cognizable harm" and

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[2] *See, e.g., Bowden v. Korean Air Lines*, 814 F. Supp. 592, 598 (E.D. Mich. 1993), *rev'd sub nom. Bickel v. Korean Air Lines*, 83 F.3d 127, 132 (6th Cir.), *amended on reh'g*, 96 F.3d 151 (6th Cir. 1996); *In re Inflight Explosion on TWA Aircraft Approaching Athens, Greece on Apr. 2, 1986*, 778 F. Supp. 625, 637 (E.D.N.Y. 1991), *rev'd on other grounds*, 975 F.2d 35 (2d Cir. 1992), *cert. denied*, 507 U.S. 1051 (1993); *In re Air Crash Disaster Near Honolulu, Hawaii, on Feb. 24, 1989*, 783 F. Supp. 1261, 1264 (N.D. Cal. 1992).

[3] *See, e.g., Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984); *Barbe v. Drummond*, 507 F.2d 794, 799 (1st Cir. 1974); *Dugas v. Nat'l Aircraft Corp.*, 438 F.2d 1386, 1389 (3d Cir. 1971).

that courts are to determine "legally cognizable harm" *only* by reference to the applicable domestic law under the forum's choice-of-law rules, pursuant to Article 24 of the Convention. *Id.* In *Zicherman*, as in these cases, the applicable domestic law is DOHSA. *Id.* at 635-36.

The Court in *Zicherman* also rejected the rationale and holding of the Court of Appeals for the Second Circuit (from which the *Zicherman* case emanated) that general maritime/federal common law is the proper domestic law to consider. *Id.* The Court explained that Article 17 of the Convention is merely a "pass-through" provision that does not permit federal courts "to develop some common-law rule—under cover of general admiralty law or otherwise—that will supersede the normal federal disposition" absent the Convention. *Id.* at 636. Thus, federal courts are authorized only "to apply the law that would govern in absence of the Warsaw Convention." *Id.*

The applicable law in *Zicherman* was DOHSA, which permits recovery of pecuniary damages only. *Id.*; 46 U.S.C. App. § 762 (RA 13). The Court, therefore, concluded that nonpecuniary damages for loss of society (the only specific damage award involved in *Zicherman*) were unavailable. *Id.* The Court specifically noted that it did not consider "whether § 762 [of DOHSA] contradicts the District Court's allowance of pain and suffering damages," because the question was not before the Court. *Id.* at 636, n.4.

Following the Court's decision in *Zicherman*, KAL moved the court below for permission to submit a supplemental brief in each of the pending appeals to address the recoverability of nonpecuniary pre-death pain and suffering damages as a matter of law, in light of *Zicherman*. In response, the court below directed the parties to submit supplemental briefs addressing the significance of *Zicherman* on the pending appeals. *See Okai* Order (9th Cir. Mar. 6, 1996) (RA 10); *Yamaguchi* Order (9th Cir. Mar. 6, 1996) (RA 8). The effect of the *Zicherman*

decision then was fully briefed by the parties in their respective supplemental briefs and addressed at oral argument of the appeals.

C. The Decision of the Court Below

On August 2, 1996, the court below rendered its decision and held that: (1) *Zicherman* clearly foreclosed the recovery of nonpecuniary damages for loss of society and (2) the Court's reasoning in *Zicherman* "effectively forecloses any claims under American law for nonpecuniary damages, including compensation for the grief of the survivors, and the pre-death pain and suffering." *Saavedra v. Korean Air Lines*, 93 F.3d 547, 549-51 (9th Cir. 1996) (A 1a, 9a-10a).

The court below rejected Petitioners' argument in their supplemental brief that survivor's grief and pre-death pain and suffering damages were recoverable under Korean law pursuant to § 764 of DOHSA. 46 U.S.C. App. § 764 (RA 13). The court concluded that, under the facts and proceedings in the district court (*see* discussion *supra* at 3), Petitioners had "failed to preserve this theory in the district court, and it is hence unavailable to her on appeal." *Saavedra*, 93 F.3d at 552 (A 15a).

The court below also rejected Petitioners' argument that DOHSA can be supplemented with nonpecuniary damages under general maritime law. *Id.* at 553-54 (A 17a-18a). In light of *Zicherman*, the court concluded that it was:

> compelled to hold that because DOHSA does not allow recovery for nonpecuniary damages, we cannot 'supplement' Congress' remedy, allowing a general maritime survival action for nonpecuniary damages, including the pre-death pain and suffering claimed here.

Id. at 554 (A 19a).

ARGUMENT

I

THE PETITION SHOULD BE GRANTED LIMITED TO THE QUESTIONS AS RESTATED HEREIN

KAL agrees with Petitioners that the question of whether DOHSA may be supplemented with nonpecuniary pre-death pain and suffering damages is important and worthy of review. KAL also agrees that there is a conflict among the circuit courts on this question, but not only on the basis identified by Petitioners.

Petitioners suggest that a "conflict now exists among the circuit courts as to whether a general maritime law survival action for a decedent's pre-death pain and suffering" may exist in an action governed by DOHSA. Petition at 6. While a conflict does exist, Petitioners fail to identify the real conflict. The actual conflict that now exists is between the decision of the court below, which properly applied *Zicherman*, and the decisions of the Court of Appeals for the District of Columbia Circuit in *Forman v. Korean Air Lines*, 84 F.3d 446 (D.C. Cir. 1996) ("*Forman*"), *petition for cert. filed sub nom. Korean Air Lines v. Forman*, No. 96-530 (docket, Oct. 3, 1996), and the amended decision of the Court of Appeals for the Sixth Circuit in *Bickel v. Korean Air Lines*, 96 F.3d 151 (6th Cir. 1996) ("*Bickel II*"), *amending on reh'g*, 83 F.3d 127 (6th Cir. 1996) ("*Bickel I*"). In both cases, the court failed to properly apply *Zicherman* and as a result, upheld awards of nonpecuniary pre-death pain and suffering damages based solely on Article 17 of the Warsaw Convention.

The court below recognized that, in light of the intervening *Zicherman* decision, the district court's theory that nonpecuniary pre-death pain and suffering damages are recoverable directly under the Warsaw Convention no longer is tenable. *Saavedra*, 93 F.3d at 553 (A 16a). Thus, the court below

undertook an analysis of the applicable domestic law, DOHSA, and concluded, on the basis of *Zicherman*, that (1) DOHSA "will not brook pain and suffering relief" and (2) DOHSA cannot be supplemented with a "general maritime survival action for nonpecuniary damages, including pre-death pain and suffering" damages. *Id.* at 553-54 (A 16a-19a). Such is the clear teaching of the intervening *Zicherman* decision.

The district courts in *Forman*[4] and *Bickel*[5] similarly had held that nonpecuniary pre-death pain and suffering damages were available directly under the Convention. However, unlike the court below, the Courts of Appeals in *Forman* and *Bickel II* declined to address the argument that the intervening decision in *Zicherman* rendered invalid the legal basis for the award of nonpecuniary damages for pre-death pain and suffering and upheld the awards based solely on Article 17 of the Warsaw Convention. *Bickel II*, 96 F.3d at 153-54; *Forman*, 84 F.3d at 448-49. The court in *Forman* held that KAL waived the argument, because it was not raised in the opening brief. The court in *Bickel II*, which previously had found[6] *Zicherman* to create an "insuperable obstacle" to the recovery of such nonpecuniary damages, held on rehearing (2-1) that *Zicherman* "neither added to, nor made any changes in, the law regarding the availability of nonpecuniary damages under DOHSA." *Bickel II*, 96 F.3d at 153. KAL's petition for a writ of certiorari in *Forman* currently is pending before the Court.

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[4] *In re Korean Air Lines Disaster of Sept. 1, 1983*, MDL No. 565, Nos. 83-3587 *et al.*, memo. op. (D.D.C. Apr. 8, 1993) and *Forman v. Korean Air Lines*, No. 83-3587, memo. op. (D.D.C. June 6, 1995). These decisions are not officially reported but are reproduced in the Appendix at A 52a-55a and A 10a-32a to the Petition for a Writ of Certiorari in *Korean Air Lines v. Forman*, No. 96-530 (U.S., docketed Oct. 3, 1996).

[5] *Bowden*, 814 F. Supp. at 597-98.

[6] *See Bickel I*, 83 F.3d at 132.

Korean Air Lines v. Forman, No. 96-530 (U.S., docketed Oct. 3, 1996).

The real and direct conflict that exists is between the decision of the court below and the decisions in *Forman* and *Bickel II*: (1) all three appeals arise out of the KAL flight KE007 disaster; (2) the district courts in all three cases awarded pre-death pain and suffering damages solely on the basis of the Warsaw Convention; (3) all three appeals were pending when *Zicherman* was decided; (4) all three Courts of Appeals directed the parties to file briefs to address the recoverability of pre-death pain and suffering damages in light of *Zicherman*; (5) *BUT*, while the court below recognized that *Zicherman* rendered the district court's legal basis for the recovery of such damages untenable and, as a result, vacated the awards of pre-death pain and suffering damages, the courts in *Forman* and *Bickel II* declined to address the argument and thereby upheld similar awards.

Petitioners ignore this real and direct conflict and argue that a conflict exists only between the decision of the court below and various pre-*Zicherman* decisions which have recognized and allowed a general maritime law survival action for nonpecuniary damages to supplement the pecuniary damage restriction of DOHSA. *See* Petition at 10.[7] Petitioners fail to recognize that the post-*Zicherman* courts that have addressed the recoverability of nonpecuniary pre-death pain and suffering damages, save one[8], have concluded that *Zicherman* forecloses recovery of *all* nonpecuniary damages, including pre-death pain and suffering damages. As explained by the court below:

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[7] Petitioners' argument that the decision of the court below reversed *Evich v. Connelly*, 759 F.2d 1432, 1434 (9th Cir. 1985), *cert. denied*, 484 U.S. 914 (1987), is baseless. Petition at 10. *Evich* involved death actions arising in the *territorial waters* of the United States. DOHSA was not applicable.

[8] *See Beirn v. Korean Air Lines*, Nos. 83-4624, 83-4626, memo. op. (E.D.N.Y. Aug. 28, 1996) (reproduced herein at RA 14).

> We hold that the Supreme Court's reasoning in *Zicherman*, although directly dealing only with a claim for loss of society, effectively forecloses any claims under American law for nonpecuniary damages, including compensation for the grief of the survivors, and the pre-death pain and suffering of the victims.
>
> * * *
>
> The Supreme Court, in holding that DOHSA cannot be supplemented by general maritime law in order to obtain loss of society damages, gave no indication that there was any material difference between loss of society damages and any other nonpecuniary damages, all of which DOHSA expressly disallows. Nor can we find any basis for such a distinction.

Saavedra, 93 F.3d at 550-51, 554 (A 10, 19).

Upon this same rationale, the unanimous panel in *Bickel I* originally found that "the principle of *Zicherman* constitutes an *insuperable obstacle* to an award of pain and suffering damages" and the KAL 007 multidistrict litigation transferee district court, reversing its own pre-*Zicherman* 1993 ruling, concluded that such damages now are precluded by *Zicherman*. *See Bickel I*, 83 F.3d at 132 (emphasis added); *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10, 15 (D.D.C. 1996), *interlocutory appeal granted*, No. 96-8013 (D.C. Cir. Aug. 15, 1996); *see also Bickel II*, 96 F.3d at 157-58 (Batchelder, J., dissenting); *contra Beirn*, memo. op. at RA 24-25.

In light of the conflicting decisions of the lower courts as to the effect of the intervening decision in *Zicherman* on pending, but undecided appeals, the Court should grant certiorari in this and in the *Forman* case, to resolve whether the pecuniary damage standard of DOHSA may be supplemented by *any* nonpecuniary damages, including pre-death pain and

suffering damages, on the basis of the Warsaw Convention, general maritime law or state law.

II

THE OTHER QUESTIONS PRESENTED DO NOT WARRANT REVIEW

The second and third questions presented by Petitioners do not warrant review by the Court. The decision of the court below in respect of these questions is not in conflict with any decision of the Court or with the decision of any other Circuit Court of Appeals, but is in accord with well settled legal principles and precedent.

A. Petitioners Elected to Proceed Under United States Law Alone

Petitioners seek review of an "alleged" conflict among the district courts regarding the "interplay between §§ 761/762 and § 764 of DOHSA." Petition at 12.[9] Petitioners fail to demonstrate that any conflict does exist or that § 764 of DOHSA even applies in these cases.

Petitioners accept that *Zicherman* requires a choice of law analysis in order to determine which sovereign's domestic law governs the types of recoverable compensatory damages available in a case to which the Warsaw Convention applies. Petition at 13. Petitioners and KAL agree that the issue of compensatory damages in these cases is governed by the law of the United States and, specifically, DOHSA. Petitioners argue, however, that they are entitled to all DOHSA damages and, through operation of § 764 of DOHSA, to all available damages under Korean law. Petition at 7, 12-13.

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[9] Section 761 of DOHSA permits a cause of action based upon American law and § 764 permits a cause of action based upon an applicable foreign law. 46 U.S.C. App. §§ 761, 764 (RA 13).

If, by agreement of the parties, as here, or by a choice of law analysis, it is determined that the law of the United States applies to determine the types of recoverable damages, then § 762 of DOHSA alone prescribes the types of recoverable damages for a death on the high seas. *See In re Korean Air Lines Disaster of September 1, 1983*, 935 F. Supp. 10, 14, n.2 (D.D.C. 1996) ("Because this Court has determined that United States law governs . . . and that DOHSA applies, Plaintiffs' argument that mental grief damages are available because Korean law permits claims for such damages is irrelevant"); *accord Beirn*, memo. op. at RA 28. Since the parties in these cases consented to the application of United States law, § 764 of DOHSA is not applicable and was irrelevant to the decision of the court below. Petitioners cannot now properly present a question for review which was irrelevant to the decision rendered.

Moreover, Petitioners fail to address the fact that the court below held that Petitioners had waived and affirmatively abandoned any application of Korean law in the district court. *Saavedra*, 93 F.3d at 552-53 (A 14a-17a). In rejecting Petitioners' argument for the application of both § 761 and § 764, the court below specifically noted that Petitioners had requested the district court to "delete any reference to Korean law, and to hold instead that survivor's grief damages were available directly under the Warsaw Convention". *Id.* at 552 (A 15a). Similarly, the court below rejected Petitioners' attempt to recover nonpecuniary damages for pre-death pain and suffering under § 764, because Petitioners never had advanced that argument in the district court. *Id.* at 553 (A 16a-17a). Thus, the court below did not reach Petitioners' argument that § 761 and § 764 of DOHSA are cumulative remedies.

Petitioners would have the Court simply ignore what transpired in the court below and grant review to resolve in a vacuum an "alleged" conflict among the district courts as to

whether the remedies of § 761 and § 764 of DOHSA are mutually exclusive. Petition at 7, 12-13.

There is no "conflict" among the district courts which warrants review by the Court. All courts which have addressed the issue directly have concluded that damages may *not* be recovered under both § 761 and § 764 of DOHSA. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10, 14, n.2 (D.D.C. 1996); *Beirn*, memo. op. at RA 27-28. *In re Air Crash Disaster Near Bombay, India on Jan. 1, 1978*, 531 F. Supp. 1175, 1186 (W.D. Wash. 1982); *Bergeron v. Koninklijke Luchtvaart Maatschappij, N.V.*, 188 F. Supp. 594, 596 (S.D.N.Y. 1960); *see also Park v. Korean Air Lines*, 24 Av. Cas. (CCH) 17,253, 17,260 & n.17, 1992 WL 331902 (S.D.N.Y. 1992). These decisions hold that, while § 764 allows a cause of action based upon foreign law to be brought in admiralty in federal court, it must first be determined that the foreign law even applies pursuant to a choice of law analysis. *Id.*; *see Noel v. Airponents, Inc.*, 169 F. Supp. 348, 350 (D.N.J. 1958). As discussed *supra* at 11-12, Petitioners already have agreed to the application of United States law.

The cases relied upon by Petitioners do not establish a conflict warranting intervention by the Court. Petition at 12. *Noel v. Linea Aeropostal Venezolana*, 260 F. Supp. 1002, 1006, n.24 (S.D.N.Y. 1966), recognized that its decision was consistent with *Bergeron*; *Heath v. American Sail Training Ass'n*, 644 F. Supp. 1459 (D.R.I. 1986), provides no analysis of § 761 and § 764; and *Powers v. Cunard S.S. Co.*, 32 F.2d 720 (2d Cir. 1925), does not address the issue.

B. The Court Below Properly Addressed and Decided the Effect of the Intervening *Zicherman* Decision on the Pending but Undecided Appeals

Petitioners argue that the court below lacked the authority to address and decide the recoverability of nonpecuniary predeath pain and suffering damages, pursuant to the doctrine of issue preclusion. Petition at 7, 14. Petitioners fail to articulate

how or why the doctrine applies or how the court below erred in addressing the effect of an intervening decision of the Court on the pending but undecided appeals.

An appellate court has a duty to apply retroactively intervening decisions of the Supreme Court interpreting a statute or treaty to all cases still open to direct review. *Rivers v. Roadway Express*, 114 S. Ct. 1510, 1519 (1994); *see Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 96 (1993); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 540-545 (1991). In addition, it is well settled that an appellate court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law. *See United States National Bank of Oregon v. Independent Insurance Agents*, 508 U.S. 439, 446-48 (1993). As noted by the Court in *Bank of Oregon*, an appellate court may consider an issue antecedent to and ultimately dispositive of the dispute before it, even an issue the parties fail to identify or brief. *Bank of Oregon*, 508 U.S. at 445-47. In advancing the "issue preclusion" argument, Petitioners simply ignore these decisions of the Court.

Petitioners concede that under *Zicherman* "the types of recoverable damages in an action governed by the Warsaw Convention must be determined by reference to domestic law. . . ." Petition at i. Thus, Petitioners cannot escape the fact that *Zicherman* eliminated the **sole** legal basis upon which the district court in these cases had allowed the recovery of all nonpecuniary damages, including pre-death pain and suffering damages.[10] After *Zicherman*, the court below was required to find a domestic law basis for the award of nonpecuniary pre-death pain and suffering damages, which in turn *obligated*

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[10] Any argument that *Zicherman* applies only with regard to wrongful death damages is unfounded. *See* Petition at 13. The Court's holding in *Zicherman* is not limited to wrongful death, but applies to the determination of *all* "damages" recoverable in an action governed by the Warsaw Convention.

the court below to address the question whether such non-pecuniary damages are recoverable under DOHSA, the applicable domestic law in this case. *See Pescatore v. Pan Am World Airways*, 97 F.3d 1 (2d Cir. 1996). Neither issue preclusion, nor any related doctrine, could serve to preclude the court below from addressing and deciding the effect of *Zicherman* on the pending but undecided appeals.

CONCLUSION

The Court should grant the Petition herein, together with the Petition in *Korean Air Lines v. Forman*, No. 96-530 (U.S., docketed Oct. 3, 1996), in order to resolve the conflict which now exists in the Courts of Appeals and in the district courts, as to the proper application and effect of the intervening decision of the Court in *Zicherman* on the recoverability of non-pecuniary damages for pre-death pain and suffering under DOHSA. The Petition herein otherwise should be denied.

Dated: November 6, 1996

Respectfully submitted,

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APPENDIX

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Nos. CV84-9324-IH
CV84-9329-IH
CV84-9330-IH
CV84-9334-IH
CV84-9343-IH
CV85-4869-IH
CV85-5327-IH
CV85-5329-IH
CV85-5490-IH

Filed October 19, 1992

KIMBERLY S. SAAVEDRA, et al.,

Plaintiffs,

—v.—

KOREAN AIR LINES CO., LTD., et al.,

Defendants.

ORDER DECLARING APPLICABLE LAW

There came before the Court on September 21, 1992, certain motions, listed below, to declare applicable law with respect to damage issues. By stipulation of counsel, the said motions were deemed to apply to each and every case listed in the caption of this order. The motions were:

Motion No. 1: Motion of defendant Korean Air Lines Co., Ltd. ("KAL") filed August 17, 1992, and denominated "Motion Re Applicable Damage Law".

Motion No. 2: Motion of defendant KAL filed August 17, 1992, denominated "Motion to Strike Jury Demand".

Motion No. 3: Motion of plaintiffs filed August 14, 1992, denominated "Motion to Award Prejudgment Interest at the Prime Rate".

Appearances were as follows: For defendant KAL, Condon & Forsyth by Stephen R. Ginger, Esq. and Victor M. Bartholetti, Esq.; and for plaintiffs, Speiser, Krause, Madole and Cook by Juanita M. Madole, Esq. and Belli, Belli, Brown, Monzione, Fabbro & Zakaria by Richard Brown, Esq.

The Court, having considered each said motion together with the points and authorities, evidence and other documents filed in support and in opposition thereto, and having heard argument, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. *As to Motion No. 1.* plaintiffs' claims for wrongful death are governed by the Warsaw Convention.[1] The elements of plaintiffs' claim for wrongful death in these cases are defined by reference to the Death on the High Seas Act, 46 U.S.C. Sec. 761 et seq. Plaintiffs' claims for wrongful death are limited to items of pecuniary damages. The pecuniary damages recoverable in these cases include, and are limited to, damages for loss of support, damages for loss of services, damages for loss of nurture, damages for loss of inheritance and funeral and burial expenses.

There are certain issues under Motion No. 1 that are as yet undecided. They are: Which relatives are entitled to damages for each of the items of damage listed above in this paragraph

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Stat. 3000 (1934), T.S. No. 876, 1137 L.N.T.S. 11, *reprinted* in 49 U.S.C. Sec. 152 note (1976).

and what showing, if any, of dependency is required for any relative to be so entitled. Those questions will be heard and decided on November 2, 1992, at 2 P.M. The briefing will be as follows: Plaintiffs' are to make the motion with respect to these items and file their motion and opening brief not later than October 5 1992. Defendants' opposition shall be filed not later than October 15, 1992. Plaintiffs' reply, if any, shall be filed not later than October 21, 1992.

Also as to *Motion No. 1*, plaintiffs are entitled to assert and recover, upon an appropriate showing, a survival claim for the decedents' predeath pain and suffering, based on Article 17 of the Warsaw Convention.

Plaintiffs are also entitled to assert and recover, upon an appropriate showing, a claim for the mental anguish and grief of decedents' relatives, said claim being based on Korean law. Said claim is allowable pursuant to 47 U.S.C. Sec. 764.

2. As to *Motion No. 2:* Plaintiffs' jury demand is deemed valid and proper and the motion to strike the jury demand is denied.

3. As to *Motion No. 3:* Prejudgment interest is recoverable of the following items:

a) The past mental anguish, grief and sorrow of decedents' relatives;

b) Plaintiffs' survival claim for predeath pain and suffering of decedents.

c) Plaintiffs' claim for past support which would have been provided by decedent, prejudgment interest being payable from the date of the accident to the date of the judgment fixing damages. Prejudgment interest shall be compounded annually. The rate of prejudgment interest will be the rate for 52-Week T-Bills as set forth in 28 U.S.C. Sec. 1961.

4. A transcript of the proceedings in open court on September 21, 1992, shall be filed when produced. It is incorporated

herein by reference. The transcript shall constitute the Court's further findings and conclusions as well as a further statement of the Court's reasons.

5. The Clerk shall transmit a copy of this order by U.S. mail to all counsel of record.

DATED: October 19, 1992.

/s/ IRVING HILL
IRVING HILL, Judge
United States District Court

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Nos. CV84-9324-IH
CV84-9329-IH
CV84-9330-IH
CV84-9334-IH
CV84-9343-IH
CV85-4869-IH
CV85-5327-IH
CV85-5329-IH
CV85-5490-IH

Filed July 16, 1993

KIMBERLY S. SAAVEDRA, et al.,

Plaintiffs,

—v.—

KOREAN AIR LINES CO., LTD., et al.,

Defendants.

ORDER AMENDING ORDER OF OCTOBER 19, 1992 DENOMINATED "ORDER DECLARING APPLICABLE LAW"

There came before the Court for hearing on July 6, 1993, a motion by plaintiff filed May 25, 1993 denominated as plaintiff's "Supplemental Motion Regarding Applicable Law".

Appearances were as follows: For plaintiffs, Speiser, Krause, Madole & Cook by Juanita M. Madole, Esq.; and Herrmann & Associates by Charles Herrmann, Esq., and for defendant Condon & Forsyth by Stephen R. Ginger, Esq. and Kevin Sutherland, Esq.

The said motion sought amendment of the Court's order filed October 19, 1992 and denominated "Order Declaring Applicable Law" in two separate aspects.

Proposed Amendment No. 1: Plaintiff sought amendment of the said order of October 19, 1992, as to page 2, lines 15 through 19 thereof. Plaintiff sought to delete from said lines the reference to Death on the High Seas Act, and also to delete the sentence on lines 18-19 limiting claims to items of pecuniary damage.

The motion also sought the addition of new language in paragraph 1 of the order at page 2 which would allow recovery of non-pecuniary damage items.

The Court, having considered the said motion as to this aspect, together with the points and authorities, and other documents filed in support thereof and in opposition thereto, and having heard argument, this aspect of the motion is denied.

Proposed Amendment No. 2: Plaintiff's motion also sought the deletion of a paragraph starting at page 3, line 14 of said order of October 19, 1992, and ending at line 17 of said page 3. Plaintiff sought to have new language inserted to the effect that claims for mental anguish and grief of decedents' relatives would be based on the Warsaw Convention only and not on Korean law. Plaintiff's motion also sought the deletion from the paragraph of any reference to Death on the High Seas Act. Further, Plaintiff's motion sought to add a requirement that recovery for mental anguish and grief be allowed only if accompanied by physical manifestations.

The Court, having considered this second aspect of the motion together with the with the points and authorities, and other documents filed in support thereof and in opposition

thereto, and having heard argument, the Court orders that this aspect of the motion is granted and finds that no prejudice is shown to defendant from so ordering.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Page 3, lines 14 through 17 inclusive of said order of October 19, 1992, are deleted and the following language substituted in place thereof:

> "Plaintiffs are also entitled to assert and recover, upon an appropriate showing, a claim for the mental anguish and grief of decedents' relatives, said claim being based on the Warsaw Convention, provided the showing of such mental anguish and grief as to each decedents' relative involved is accompanied by a showing of physical manifestations of said relative."

2. A transcript of the proceedings in open court on July 6, 1993, shall be filed when produced. It is incorporated herein by reference. It shall constitute the Court's further findings of fact and conclusions of law as well as a further statement of the Court's reasons.

3. The Clerk shall transmit a copy of this order by U.S. mail to all counsel of record.

DATED: July 16 , 1993.

/s/ IRVING HILL
IRVING HILL, Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 94-55018
94-55060
94-55161

D.C. No. CV-84-9324

Central California

Filed March 6, 1996

KIMBERLY SAAVEDRA, as Special Administratrix of the Estate of MASAKAZU YAMAGUCHI, deceased, and as Personal Representative of MAKIKO YAMAGUCHI, CHISATO YAMAGUCHI, MAMI YAMAGUCHI, MASASHI YAMAGUCHI, MASAO YAMAGUCHI, KAZUE YAMAGUCHI, KAZUHIKO YAMAGUCHI,

Plaintiffs-Appellees/
Cross-Appellants,

—v.—

KOREAN AIR LINES CO., LTD.,

Defendant-Appellant/
Cross-Appellee.

ORDER

The court on its own motion requests supplemental briefing in light of the Supreme Court's decision in *Zicherman v. Korean Air Lines Co., Ltd.*, 116 S. Ct. 629 (1996).

Both parties may file supplemental briefs, not to exceed fifteen pages, addressing how *Zicherman* applies to the issues raised on appeal. These briefs are due no later than March 18, 1996. No motions for extension of time will be granted.

Alternatively, parties may notify this court by March 18, 1996, that they do not wish to submit a supplemental brief.

For the Court:

/s/ KENT L. BRINTNALL
Kent L. Brintnall
Deputy Clerk/Staff Attorney
9th Cir. R. 27-7/Gen. Ord.
U.S. Court of Appeals, App. A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 94-55495
94-55496

D.C. No. CV-84-9329

Central California

Filed March 6, 1996

KIMBERLY SAAVEDRA, as Special Administratrix of the Estate of MAKOTO OKAI, deceased, and as Special Administratrix of the Estate of YOOKO OKAI, deceased,

Plaintiff-Appellant/
Cross-Appellee,

—v.—

KOREAN AIR LINES CO., LTD.,

Defendant-Appellee/
Cross-Appellant.

ORDER

Korean Air Lines's motion for supplemental briefing is granted.

Both parties may file supplemental briefs, not to exceed fifteen pages, addressing how *Zicherman v. Korean Air Lines Co., Ltd.*, 116 S.Ct. 629 (1996), applies to the issues raised on

appeal. These briefs are due no later than March 18, 1996. No motions for extension of time will be granted.

Alternatively, parties may notify this court by March 18, 1996, that they do not wish to submit a supplemental brief.

For the Court:

/s/ KENT L. BRINTNALL
Kent L. Brintnall
Deputy Clerk/Staff Attorney
9th Cir. R. 27-7/Gen. Ord.
U.S. Court of Appeals, App. A

Relevant Provisions of The Warsaw Convention

Article 17

The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018.

Article 24

1. In the cases covered by Articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

2. In the cases covered by Article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

49 Stat. 3020.

Relevant Provisions of the Death on the High Seas Act, 46 U.S.C. § 761 *et seq.*

§ 761. Right of action; where and by whom brought

Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

§ 762. Amount and apportionment of recovery

The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

§ 764. Rights of action given by laws of foreign countries

Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

83-CV-4624 (TCP)
83-CV-4626 (TCP)

MARIA BEIRN, Executrix of the Estate of JAMES BEIRN, deceased, and ROBERT SPEIR, Executor of the Estate of KATHY BROWN SPEIR, deceased,

Plaintiffs,

—against—

KOREAN AIR LINES CO., LTD.,

Defendant.

MEMORANDUM AND ORDER

PLATT, District Judge,

Defendant Korean Air Lines, Co., Ltd., ("KAL"), has moved this Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an Order dismissing plaintiffs' claims for nonpecuniary damages for: (1) loss of society; (2) survivor's grief; (3) pre-death pain and suffering of the decedent; and (4) loss of non-physical services.

Because the U.S Death on the High Seas Act ("DOHSA") does not provide for awards of nonpecuniary damages in wrongful death actions, defendant's motion is granted with respect to plaintiffs' claims for loss of society and survivor's

grief. Plaintiffs' claims for loss of non-physical services also are dismissed, except for the claims for loss of services brought on behalf of the decedents' minor dependents.

Defendant's motion is denied, however, with respect to plaintiffs' claims for the decedents' pre-death pain and suffering. Because a survival action exists under general maritime law; and because neither Congress, the Supreme Court, nor the Second Circuit has, to date, deemed DOHSA to be the exclusive remedy for deaths occurring on the high seas; and because of offensive collateral estoppel may well be applicable in this case; plaintiffs have a legal basis for pursuing these damages in a supplemental survival action.

BACKGROUND

Kathy Brown Speir and James Beirn (the "decedents") were passengers on Korean Air Lines flight 007, which was shot down by Soviet military aircraft on September 1, 1983. Plaintiffs filed the instant actions to recover damages on behalf of themselves, the decedents' estates, and the decedents' minor dependents.[1] KAL's liability for the accident was determined in the context of multidistrict litigation proceedings in the District Court for the District of Columbia. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.) (upholding the district court's finding of willful misconduct), *cert. denied*, 502 U.S. 994 (1991). Therefore, the only issues remaining for trial are the nature and quantum of recoverable compensatory damages.

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[1] Plaintiff Robert Speir seeks damages on behalf of decedent's daughter, Aimee Claire Brown. Plaintiff Maria Beirn seeks damages on behalf of decedent's step-daughter, Rosa Maria Salvador Lindez.

DISCUSSION

These actions are governed by the Warsaw Convention,[2] as they arise out of an incident involving international transportation by air. *In re Air Disaster at Lockerbie, Scotland, on Dec. 21, 1988*, 928 F.2d 1267, 1274-80, *cert. denied*, 502 U.S. 920 (1991) ("*Lockerbie I*"). While the Warsaw Convention is applicable, it does not address the issue of recoverable compensatory damages, but instead relegates such matters to the laws of the nation in which the action is filed. *Zicherman*, 116 S. Ct. at 632-35.

In light of the Supreme Court's recent decision in the *Zicherman* case, it is clear that the Death on the High Seas Act (DOHSA), 46 U.S.C.A. § 761 *et seq.*, is the internal law of the United States that applies to all wrongful deaths occurring on the high seas.[3] 116 S. Ct. at 636-37. Further, it is clear that DOHSA does not provide for an award of nonpecuniary damages. 46 U.S.C. § 762; *Zicherman*, 116 S. Ct. at 636-37.

In their motion papers, plaintiffs do not contest defendant's argument that loss of society damages are unavailable under DOHSA. Moreover, plaintiffs do not offer an alternative theory of recovery of these damages. Thus, in light of the Supreme Court's decision in *Zicherman*; defendant's motion to dismiss plaintiffs' claims for loss of society may be granted at this juncture.

Nonetheless, plaintiffs do set forth three theories under which they contend that damages for decedent's pre-death pain and suffering, survivor's grief, and non-physical services may be recovered:

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[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876 (1934) (reprinted in note following 49 U.S.C. § 1502 (1988 ed.)).

[3] Defendant asserts that U.S. law applies to this action because decedents were U.S. citizens and residents and all of the claimants are U.S. residents. (Mem. of Points and Authorities in Support of Def. KAL's Motion to Dismiss Nonpecuniary Claims at 3 n. 4.) Plaintiffs do not contest this assertion.

(1) plaintiffs may bring a survival action under general maritime law to supplement their wrongful death action governed by DOHSA, for an award of nonpecuniary damages for decedent's pre-death pain and suffering;

(2) plaintiffs may take advantage of both § 761 and § 764 of DOHSA, thus allowing plaintiffs to recover nonpecuniary damages for decedent's pre-death pain and suffering and survivor's grief under Korean law; and

(3) damages for nonphysical services are recoverable as pecuniary damages under DOHSA.

The Court finds all but the first of these theories to be without merit and will address each theory in turn.

A. Supplementing DOHSA with General Maritime Law

1. The Parties' Arguments

At the outset, plaintiffs emphasize that DOHSA is a wrongful death statute. *See* 46 U.S.C. § 761. Therefore, it provides a right of action for damages "for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative" against the corporation that would have been liable had death not ensued. *Id.* Typically, wrongful death remedies compensate a decedent's beneficiaries for the losses they sustained as a result of the decedent's death, such as loss of support and financial contributions, loss of inheritance, and loss of services. *See* W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 127, at 949 (5th ed. 1984). Under section 762 of DOHSA, the damages available for a wrongful death occurring on the high seas are limited to "*pecuniary* loss sustained by persons for whose benefit the suit is brought." 46 U.S C. § 762 (emphasis added). For this reason, plaintiffs attempting to recover nonpecuniary damages for loss of society and survivor's grief under DOHSA have been consistently

unsuccessful. *E.g.*, *Zicherman*; *Bickel v. Korean Air Lines*, Nos. 93-2144/2259/2549; 94-1095/1096/1098/1100/1101, 1996 WL 203349, *5-*6 (6th Cir. Apr. 29, 1996); *In re Korean Air Lines Disaster of Sept. 1, 1983*, Nos. 83 Civ. 2793, 83 Civ. 2940, 84 Civ. 0331, 84 Civ. 0332, 84 CV-1710 (D.D.C. June 4, 1996).

Plaintiffs argue, however, that they are entitled to nonpecuniary damages under general maritime law for the decedents' pre-death pain and suffering. Under plaintiffs' theory, a survival action governed by general maritime law may supplement their wrongful death claims governed by DOHSA. In support of this theory, plaintiffs contend that courts have consistently recognized the distinction between wrongful death and survival actions and the different remedies that each claim affords. *E.g.*, *Azzopardi v. Ocean Drilling and Exploration Co.*, 742 F.2d 890, 893 (5th Cir. 1984) (citing *Sealand Services Inc. v. Gaudet*, 414 U.S. 573, 575 n. 2 (1974)); *Ospina v. Trans World Airlines*, 778 F. Supp. 625, 629 (E.D.N.Y. 1991). Whereas wrongful death compensates the decedent's beneficiaries for the losses they sustained as a result of the decedent's death, survival actions compensate the personal representative of the decedent's estate for damages that the decedent could have recovered but for death. *See Yamaha Motor Corp. v. Calhoun*, 40 F.3d 622, 737-38 (3d Cir. 1994) (explaining the distinction between a wrongful death cause of action and an action for pre-death pain and suffering), *aff'd*, 116 S. Ct. 619 (1996).

It is undisputed that DOHSA is the U.S. law that applies to all wrongful deaths occurring on the high seas. DOHSA is silent, however, as to whether it should also serve as the basis for survival actions. Therefore, according to plaintiffs, Congress has left a gap in DOHSA's coverage.

As a result of this gap, plaintiffs argue that general maritime law survival actions should be permitted to supplement DOHSA. Plaintiffs rely upon *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), in which the Supreme Court established a general maritime action for wrongful death occurring in ter-

ritorial waters. Following the Supreme Court's decision in *Moragne*, numerous other courts expanded upon the Supreme Court's holding and allowed plaintiffs to bring survival actions under general maritime law, in addition to wrongful death actions governed by DOHSA. *E.g.*, *Barbe v. Drummond*, 507 F.2d 795, 799-800 (5th Cir. 1974); *Azzopardi*, 742 F.2d 890, 893-94 (5th Cir. 1984); *Ospina v. Trans World Airlines*, 778 F. Supp. 625, 630, 636 (E.D.N.Y. 1991), *rev'd on other grounds*.

In contrast, defendant argues that Congress intended DOHSA to be the exclusive remedy for actions arising out of deaths on the high seas and that courts are not free to supplement this remedy. *See, e.g.*, *Yamaha Motor Corp. v. Calhoun*, 116 S. Ct. 619, 628 (1996); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 30-36 (1990); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 232 (1986); *Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618, 624-45 (1978). Defendant argues that Congress was fully aware of the distinction between wrongful death and survival actions when it enacted DOHSA; in fact, a few weeks after it enacted DOHSA, Congress enacted the Jones Act, which specifically provides a survival remedy for pain and suffering for seamen. Furthermore, after the Supreme Court refused to supplement the Federal Employers' Liability Act ("FELA") with a state survival provision that was not statutorily prescribed, Congress amended FELA to provide a survival action in addition to the wrongful death remedy. This demonstrates, defendant claims, that if Congress had intended to allow survival actions for deaths on the high seas, it would have provided for a survival action under DOHSA.

Further, defendant contends that plaintiffs' reliance on *Moragne* is improper, because the death that occurred in that case was in territorial waters. Therefore, DOHSA did not apply, and the Court created a general maritime wrongful death remedy for the beneficiaries of the deceased seaman. For a death occurring on the high seas, however, defen-

dant says DOHSA does apply, and it preempts general maritime law and provides an exclusive remedy.

Moreover, defendant disagrees that DOHSA leaves a gap that may be filled by a general maritime law survival action. Defendant distinguishes between the situation in *Moragne* where Congress had not legislated a wrongful death action applying to territorial waters, and the present situation where Congress has legislated a wrongful death action. Moreover, as the Supreme Court stated in *Mobile Oil Corp. v. Higginbotham*, 436 U.S. at 625, "Congress did not limit DOHSA beneficiaries to recovery of their pecuniary losses in order to encourage the creation of nonpecuniary supplements." Therefore, any supplemental actions would effectively override DOHSA's intended exclusivity.

Accordingly, under defendant's theory of DOHSA, plaintiffs in the present case are precluded from recovering nonpecuniary damages in supplemental survival actions under general maritime law.

2. Analysis

The issue that this Court must decide is whether DOHSA is the exclusive remedy under U.S. law for a death occurring on the high seas, or whether DOHSA may be supplemented by a survival claim under general maritime law. Neither the Supreme Court nor the Second Circuit has specifically addressed this issue. This Court has previously held, however, that DOHSA is *not* the exclusive U.S. law applicable to deaths occurring on the high seas for purposes of demanding a jury trial. *Yun v. Korean Air Lines*, 798 F. Supp. 755 (E.D.N.Y. 1992) (Platt, J.). In *Yun*, this Court also held that the Warsaw Convention creates a separate cause of action for wrongful death and survival. *Id.* at 762. This Court's decision in *Yun* has not yet been overturned, or even questioned. Therefore, under *Yun*, at least plaintiffs may be entitled to bring a survival action.

Even assuming, *arguendo*, that the Warsaw Convention does not specifically authorize a survival action, it also clearly does not preclude one, instead leaving it to the courts of the forum nation to determine whether a survival action exists under its laws.[4] Plaintiffs argue that pre-death pain and suffering is a harm cognizable under U.S. maritime law. In response, defendant argues that under this country's laws, DOHSA—a wrongful death statute that does not allow for recovery of nonpecuniary damages—is the exclusive remedy.

The Supreme Court's decision in *Zicherman* does not, in our view, completely resolve this issue. It is true that in the *Zicherman* opinion, the Supreme Court uses language appearing to reject the idea that general maritime law may apply to causes of action brought under the Warsaw Convention. *Zicherman*, 116 S. Ct. at 636. Instead, the Supreme Court arguably seems to indicate that DOHSA may apply exclusively to these actions:

> We conclude that Articles 17 and 24(2) of the Warsaw Convention permit compensation only for legally cognizable harm, but leave the specification of what harm is

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[4] Article 17 of the Warsaw Convention, as set forth in the official American translation of the governing French text, provides:

> The carrier shall be liable for damage [injury] sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage [injury] so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 3018 (emphasis added). It is important to note that the word "dommage," correctly translated from the French, means "injury," not "damages" or "damage." This is borne out by the correct translation of "any other bodily injury" in this same sentence.

In *Zicherman*, the Supreme Court rejected the argument that the word "damage" should be interpreted in its broadest sense in that we take the English dictionary definition. Instead, the Supreme Court determined that "damage" refers to legally cognizable harm, but leaves it to the adjudicating courts to specify what harm is cognizable. 116 S. Ct. at 633.

> legally cognizable to the domestic law applicable under the forum's choice-of-law rules. Where, as here, an airplane crash occurs on the high seas, DOHSA supplies the substantive United States law. Because DOHSA permits only pecuniary damages, petitioners are not entitled to recover for loss of society.

Id. at 637.

It is of the utmost significance, however, that the only issue on appeal to the Supreme Court in *Zicherman* was whether nonpecuniary damages for loss of society were available under DOHSA. Loss of society is a wrongful death remedy, as it compensates surviving family members for loss of a loved one. The issue was *not* whether a survival claim could supplement a wrongful death action governed by DOHSA. Therefore, to interpret any language in the *Zicherman* opinion as limiting a plaintiff's remedy under the Warsaw Convention to wrongful death may, in our opinion, be an improper expansion of that case's holding. At most, it seems to us that the holding in *Zicherman* may be applied to other cases where plaintiffs seek nonpecuniary damages in a wrongful death action governed by DOHSA. *See, e.g., Bickel* 1996 Westlaw 203349, at *5 (holding that nonpecuniary damages for survivor's grief are unavailable under DOHSA).

Moreover, we should not overlook that the plaintiffs in *Zicherman* did bring a survival claim, and the award made pursuant to that claim was not challenged. The plaintiffs brought their survival claim under the Warsaw Convention, and, as in the instant case, they sought nonpecuniary damages for decedent's conscious pain and suffering. 116 S. Ct. at 631. The plaintiffs in that case received $100,000 from the jury, and that award was left intact both by the Second Circuit, *Zicherman v. Korean Air Lines*, 43 F.3d 18 (1994), and the Supreme Court, 116 S. Ct. at 631 n. 1. Therefore, it may be inappropriate to assume that the Supreme Court meant by its language in the *Zicherman* opinion to preclude recovery of survival damages, particularly in these cases.

The Supreme Court's decision in *Higginbotham* also does not support defendant's proposition that general maritime law may not supplement DOHSA. In *Higginbotham*, the Supreme Court was faced with the question of "whether, in addition to the damages authorized by [DOHSA], a decedent's survivors may also recover damages under general maritime law." 436 U.S. at 618. The Supreme Court held that where DOHSA applies, it may not be supplemented by general maritime law to allow recovery for loss of society. Like *Zicherman*, the Court in *Higginbotham* only addressed the issue of wrongful death remedies, not survival remedies.[5] Therefore, like *Zicherman*, this opinion should not be expanded beyond its specific holding. The limitations that *Zicherman* and *Higginbotham* place on the recoverable damages in a wrongful death action should not necessarily have a preclusive effect on a survival action. *See Azzopardi*, 742 F.2d at 893-94; *Barbe v. Drummond*, 507 F.2d 795, 800 (5th Cir. 1974); *McAleer v. Smith*, 791 F. Supp. 923, 926 (D.R.I. 1992).

This conclusion is entirely consistent with Justice Harlan's statement in *Moragne*: "We conclude that the Death on the High Seas Act was not intended to preclude the availability of a remedy for wrongful death under general maritime law in situations not covered by the Act." 398 U.S. at 1788 (footnote omitted). The instant situation, where plaintiffs as representatives of decedents' estates seek survival damages for the decedents' pre-death pain and suffering, may be considered a situation "not covered by the Act." Therefore, as in *Moragne*, there is no reason to assume that in enacting DOHSA, Congress intended to preclude a survival remedy.

Indeed, contrary to some present thinking, Justice Harlan's view of the history and purpose of DOHSA was:

> Read in light of the state of maritime law in 1920, we believe this legislative history indicates that Congress intended to ensure the continued availability of a remedy, historically provided by the States, for deaths in ter-

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[5] The dicta quoted above at pp. 9-10 addressed "DOHSA beneficiaries" who are not necessarily the same as survival beneficiaries.

> ritorial waters; its failure to extend the Act to cover such deaths primarily reflected the lack of necessity for coverage by a federal statute, rather than an affirmative desire to insulate such deaths from the benefits of any federal remedy that might be available independently of the Act. The void that existed in maritime law up until 1920 was the absence of any remedy for wrongful death on the high seas. Congress, in acting to fill that void, legislated only to the three-mile limit because that was the extent of the problem. The express provision that state remedies in territorial waters were not disturbed by the Act ensured that Congress' solution of one problem would not create another by inviting the courts to find that the Act pre-empted the entire field, destroying the state remedies that had previously existed.
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> * * * *
>
> To put in another way, the message of the Act is that it does not by its own force abrogate available state remedies; no intention appears that the Act have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law.
>
> * * * *
>
> Respondents argue that overruling *The Harrisburg* [119 U.S. 199 (1886)] will necessitate a long course of decisions to spell out the elements of the new "cause of action." We believe these fears are exaggerated, because our decision does not require the fashioning of a whole new body of federal law, but merely removes a bar to access to the existing general maritime law. In most respects the law applied in personal-injury cases will answer all questions that arise in death cases.

398 U.S. at 1786-187, 1790 (footnotes omitted). In essence, Justice Harlan was saying that section 7 of the Act, which provides that "[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be

affected by this [Act]," 46 U.S.C.A. § 767, "does not by its own force abrogate available state remedies [or] have the effect of foreclosing any nonstatutory federal remedies that might be found appropriate to effectuate the policies of general maritime law," 38 U.S. at 1787. In short, the Act does not preclude survivor's actions or remedies for pain and suffering.

Under the circumstances, from a purely practical standpoint, it behooves us at this juncture to try these second or survivors' claims with the wrongful death claims and reach separate but joint verdicts. If we are wrong, the survivors' verdicts may simply be vacated by the Appellate Courts.

3. Conclusion

The Supreme Court has not yet been faced with the issue of whether DOHSA may be supplemented by general maritime law, allowing for a recovery of nonpecuniary survival damages. That Court has given tacit approval to survival actions, however, in that it left untouched a $100,000 jury award for pain and suffering in the *Zicherman* decision. *See* 116 S. Ct. at 631 n. 1. Furthermore, this Court's holding in *Yun* remains intact as the current law in this District on the matter of DOHSA's exclusivity. Therefore, plaintiffs may not necessarily be precluded from bringing a survival claim for the decedents' pre-death pain and suffering, and defendant's motion to dismiss this claim for lack of a legal basis must be denied, at least at this point in time.

In reaching this conclusion, the Court rejects the reasoning of other Courts holding that DOHSA is the exclusive remedy for a death occurring on the high seas. *E.g.*, *Saavedra v. Korean Air Lines*, Nos. 94-55018, 94-55495, 94-55060, 94-55496, 94-55161, 1996 Westlaw 431734 (9th Cir. Aug. 2, 1996); *Bickel*, 1996 Westlaw 203349; *In re Korean Air Lines Disaster of Sept. 1, 1983*, Nos. 83 Civ. 2793, 83 Civ. 2940, 84 Civ. 0331, 84 Civ. 0332, 84-CV-1710 (D.D.C. June 4, 1996).

In fact, it was while the instant motion was pending before this Court that we received by Federal Express from the law firm of Tompkins, Harakas, Elsasser & Tompkins, the law

firm generally acknowledged to be the "Dean" of the aviation bar, and in particular from the named partner thereof who argued the *Zicherman* case in the Supreme Court and the *Saavedra* case in the Ninth Circuit, a copy of the Court's decision in the latter case. While we have the greatest respect for all Circuit Court decisions, we may not overlook, as the Ninth Circuit may have done, the fact that the very lawyer who for whatever reason failed to seek certiorari when he had the chance on the key issue of DOHSA's exclusivity now seeks to have it in effect "both ways" as to different plaintiffs in what ultimately is essentially the same case. This unquestionably is acceptable advocacy and not improperly made in the best interests of one's clients. Nonetheless, it is an argument that this Court is unable to accept in this case, and apparently it is unacceptable to the Court of Appeals for the District of Columbia also. *See Forman v. Korean Air Lines Co.*, 84 F.3d 446, 448-49 (D.C. Cir. 1996).

We are dealing after all with a great many plaintiffs all killed, without any fault on their part, in a tragic "accident" (if in this case it may charitably to the former U.S.S.R. be so called) that "happened" not over land as in *Lockerbie* (or in territorial waters as in *Moragne*), but over the high seas, because that is where the plane was shot down. Survivors of victims on U.S. domestic flights and on international flights that terminate over land or territorial waters are accorded the full panoply of damages that the States or country, as the case may be, afford survivors in so-called wrongful death cases. These damages include dependent survivors' compensatory damages and other benefits, as well as full compensation to every decedent's estate for the pain and suffering endured by the decedent prior to his or her death. These benefits also were awarded to the *Zicherman* plaintiffs despite the fact that their airplane crashed over the high seas because, as the Ninth Circuit perceived, the Supreme Court "declined to address pain and suffering only because that award was not challenged on petition for certiorari." *Saavedra*, 1996 Westlaw 431734, at *7. Because that award was not challenged, one group of plaintiffs in the same plane crash is going to end up

with a large award sanctioned by one of our intermediate Appellate Courts, and another group is not.

Moreover, while perhaps not the "law of the case," it would certainly seem to fit the definition of offensive collateral estoppel or "issue preclusion" as it is called now, at least as against the defendant which had a full and fair opportunity to litigate this question to and beyond the Court of Appeals for the Second Circuit and chose not to do so.

We are considering here widows, orphans, and next of kin who have had to endure and live with a shattering tragedy, and for whom perhaps we are painting a picture in their minds of gross unfairness. One need only place oneself in the shoes of one of the survivors in this case who is being treated differently than others to realize how potentially unjust this result must appear to them to be. Let others subscribe to it, this Court in good conscience may not do so.

B. *The Applicability of Korean Law*

Under their second theory of recovery, plaintiffs argue that § 761 and § 764 of DOHSA may be applied concurrently. Under this theory, plaintiffs may take advantage of U.S. law pursuant to DOHSA § 761, thus recovering pecuniary damages. In addition, plaintiffs may also take advantage of Korean law pursuant to DOHSA § 764, thus recovering non-pecuniary damages for decedent's pre-death pain and suffering and survivor's grief under the Korean Civil Code. Although neither the Supreme Court nor the Second Circuit has definitively resolved the issue of whether these two sections may be applied concurrently, the correct result is that damages under these sections are mutually exclusive.

Preliminarily, this Court must determine whether § 764 of DOHSA is at all applicable to the instant case. Both sides concede that this action is governed by the Warsaw Convention and that a choice of law analysis conducted pursuant to the Convention dictates that U.S. law applies. *See infra* note 3; *see also Zicherman v. Korean Air Lines*, 116 S. Ct. 629, 637 (1996). Accordingly, § 762 of DOHSA is applicable

because it measures recoverable damages in actions brought under U.S. law. While § 764 also governs the measure of damages, it does so only in matters brought under *foreign* law. Because this case is based on United States law, § 764 is inapplicable, and plaintiffs may not recover damages under Korean law.

Even if § 764 were applicable, it may not be applied concurrently with § 762. Sections 762 and 764 were enacted to ensure that there is some basis for recovery for American victims of wrongful death on the high seas. *Bergeron v. K.L.M. Royal Dutch Airlines*, 188 F. Supp. 594, 597 (S.D.N.Y. 1960). Congress did not intend, however, for parties to have access to both bases of recovery; rather, it intended to enable parties to maintain causes of action under one of these sections. *Id.* at 596; *Bowden v. Korean Air Lines*, 814 F. Supp. 592, 599 (E.D.Mich. 1993) (holding that plaintiff could not recover damages under both U.S. and South Korean law); *In re Air Crash Disaster Near Bombay, India on January 1, 1978*, 531 F. Supp. 1175 (W.D.Wash. 1982) (holding that there is no legal basis for plaintiffs' contention that § 762 and § 764 provide cumulative remedies). Because plaintiffs may recover under § 762, they may not use § 764 as a basis for recovery under Korean law. Therefore, this Court rejects plaintiffs' contention that they may recover nonpecuniary damages pursuant to Korean law.

C. *Recovery for Non-Physical Services*

Plaintiffs argue that damages for nonphysical services are recoverable as pecuniary damages under DOHSA. Pursuant to *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 585, *reh'g denied*, 415 U.S. 986 (1974), the minor dependants of a decedent may recover damages for nonphysical services such as nurture, training, education, and guidance under DOHSA. Damages for these nonphysical services are considered pecuniary and thus are available under DOHSA. Adult plaintiffs, such as the ones in the present cases, may not recover on their own behalf pecuniary damages for nonphysical services.

Again, these damages are available only for minor dependents. Accordingly, plaintiffs' damage claims for nonphysical services may proceed on behalf of each decedent's minor dependent; plaintiffs' claims for these damages on their own behalf must be dismissed.

CONCLUSION

Based on the foregoing, defendant's motion to dismiss plaintiffs' claims for loss of society and survivor's grief must be, and is hereby, GRANTED, and these claims are DISMISSED with prejudice.

Defendant's motion to dismiss plaintiffs' claims for the decedents' pre-death pain and suffering must be, and is hereby, DENIED.

Finally, defendant's motion to dismiss plaintiffs' claims for loss of non-physical services is GRANTED, and these claims are DISMISSED with prejudice, except for the claims for loss of non-physical services brought on behalf of the decedents' minor dependents.

SO ORDERED.

/s/ THOMAS C. PLATT
District Judge, U.S.D.C.

Dated: Uniondale, New York
August 28, 1996